ORIGINAL

In the Supreme Court of Ohio

State of Ohio Plaintiff-Appellee	:	Case No. 2012-2003
vs.	:	Appeal of Fourth District Court of Appeals Decision of October 17, 2012
Jeffrey Stevens Defendant-Appellant	:	Court of Appeals Case No. 11 CA 27

Merit Brief of Appellant Jeffrey Stevens

Bryan Scott Hicks, 0065022
Attorney for Jeffrey Stevens
P.O. Box 359
Lebanon, Ohio 45036
513-228-1111
hickslawoffice@gmail.com

State of Ohio
Anneka Collins, Highland County Prosecutor
OSC # 0079572
112 Governor Foraker Place
Hillsboro, Ohio 45133
937-393-1851

RECEIVED
APR 15 2013
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
APR 15 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Table of Contents

Table of Authorities ii

Statement of the Case and Facts 1

Argument 5

Proposition of Law No. 1 5

R.C.§2923.31(I)(2)(c) requires a threshold amount of $500.00 value of contraband sold. Where the statute is ambiguous as to whether the aggregation of the combined value of contraband sold is an aggregation of the individual's illicit activities or an aggregation of the enterprise's illicit activities, the trial and appellate courts erred in adopting an interpretation against the accused and his liberty interest by aggregating the enterprise as a whole rather than the individual.

Proposition of Law No. 2 10

The defendant was convicted of Engaging in a Pattern of Corrupt Activity under R.C. §2923.32(A)(1) and his predicate acts were all fifth degree felonies. The statute is ambiguous as to whether the predicate acts are the individual's acts or any other actor in the enterprise. The statute should be interpreted as to the individual, not the enterprise and thus where a jury makes no finding of a felony predicate act of the first, second, or third degree, the defendant should be sentenced as a second degree felony rather than a first degree felony under 2923.32(B).

Conclusion 12

Certificate of Service 12

Appendix

Appendix Page

Notice of Appeal to the Ohio Supreme Court (November 30, 2012) 1

Opinion and Judgment Entry of the Fourth District Court of Appeals (Oct. 17, 2012) 3

R.C. §2901.04(A) 28

R.C.§2923.31(I)(2)(c) 29

R.C. 2923.32 (B) 30

Table of Authorities

Cases:

U.S. v. Santos 553 U.S. 507 **7**

Family Medicine Found., Inc. v. Bright 96 Ohio St.3d 183(2002), 2002-Ohio -4034 **6**

State v. Jordan 89 Ohio St.3d 488 (2000) , 2000-Ohio-225 **6**

State v. Mendenhall 2005-Ohio-3604 (2005 3rd Dist) **6**

Statutes

R.C. §2901.04(A) **7**

R.C. §2923.31(I)(2)(c) **5**

R.C. §2923.32(B) **10**

Statement of the Case and Facts

This case originated with a multiple count secret indictment against numerous defendants on complaints filed on 4/5/11. All but two of the defendants reached plea agreements. The remaining two, Jeffrey Stevens and Zachary Bondurant were tried together. A motion to sever was filed on 7/8/11 and was denied, although the record does not indicate when. The matter proceeded to a three day jury trial, beginning on August 14, 2011. Stevens was convicted on all counts pertaining to him. He was sentenced immediately after trial. A timely notice of appeal was filed and oral arguments were held. The Fourth District Court of Appeals affirmed the conviction and a timely notice of appeal was filed to this court. This court accepted discretionary jurisdiction of the case.

The Highland County Sheriff's Office cooperates with the US 23 Major Crimes Task Force, which was conducting ongoing investigations into drug trafficking. As part of that routine, Detective Sanders of Ross County Sheriff's Office came into contact with Brittany Finnegan through Sergeant Bowen of the Highland County Sheriff's Office (T.t. at 308). Detective Sanders agreed to use Finnegan to make undercover narcotics purchases (T.t. at 219). She agreed to work for payment per buy (*Id.*). On October 15, 2010, She called a Richard Rickman and arranged for a purchase of heroin (*Id.* at 312). She met Rickman at Holtfield and purchased .10 grams of heroin (T.t. at 178, State's Exhibit 1) for $33 or $34.00 (*Id.* at 313) . Rickman testified rather vaguely as to the time of his involvement, simply following the leading of the Prosecutor that it was October, November or December (T.t at 410) and then again following the leading of the Prosecutor that it was in October 2010 (T.t. at 412) Rickman testified that he bought heroin from Stevens which he sold to Finnegan (T.t. at 412-414). On October 17, 2010 Finnegan, working with Detective

Sanders, arranged via text message a purchase from Stevens (*Id.* At 225-226, 315-317) at which she paid $65.00 for what she thought was .50 grams of heroin, but in fact was only .40 grams (*Id.* at 316, State Exhibit 3, T.t. at 179). Later that same day, Detective Sanders used Finnegan to arrange a purchase from Rickman (T.t. at 228, 320), this time paying $40.00 for .095 grams of an heroin/cocaine mixture (T.t. at 321, 180 and State's Exhibit 5). On October 19th, 2010 another arrangement was made to purchase from Rickman (T.t. at 230-231, 321). This time Finnegan purchased .117 grams of an heroin/cocaine mix (T.t. at 193, State Exhibit 7) from Rickman for $40.00 (T.t. at 322-323). The final purchase using Finnegan took place on October 20th, 2010 after she texted Stevens (*Id.* at 221-223, 323-325) This time she purchased .50 grams of an heroin/cocaine mix for $65.00 (T.t. at 325, 194, State's Exhibit 9). There were thus a total of 5 purchases on three days with a value of $243.00 or $244.00.

There were also numerous witnesses who testified as to similar activity with defendant Bondurant. The State presented testimony through various witnesses to link Stevens with Rodger Cassell to establish the existence of an enterprise for corrupt activity. Maudy Jackson testified that Cassell and Stevens came to her home to sell drugs, or to eat (T.t. at 382), although on cross she stated that Stevens never dropped drugs off for her, nor saw Cassell supply drugs to Stevens (*Id.* at 385). Megan Butcher testified that she saw Stevens and Cassell in drug transactions in September 2010. She stated that she saw Cassell weighing out drugs for Stevens in the kitchen of her apartment (*Id.* at 391) On cross, however, she admitted that when asked directly about Stevens by the police she had told them she was not sure if he was dealing drugs (*Id.* at 401). Melinda Steward testified that she met Stevens through Cassell, and that she dated Stevens from August to November 2010 (*Id.* at 422-423). Steward linked Stevens with Finnegan and Rickman, stating

that Stevens and Rickman were in the dope business together (*Id.* at 423). She also saw Cassell give drugs to Stevens in October 2010 in the kitchen of a house on Olive Street (*Id.* at 425). She also claimed that both Cassell and Stevens gave her drugs to deliver, including to Bondurant (*Id.* at 428). She admitted on cross she had no specific knowledge of the five sales in October, nor could she give any specific dates on the other activities she related (*Id.* at 433-435). All of these witnesses received plea bargains and were serving prison time, although greatly reduced from their potential sentences without the pleas.

The State also presented evidence that at a storage facility of Cassell, cars and money in the total amount of about $36,000 was discovered (*Id.* at 466-471). Money from Bondurant's transactions was discovered there, but none from the transactions involving Stevens (*Id.* at 375)

Mr. Stevens testified and flatly and repeatedly denied any involvement (T.t. at 508-516). Cassell, who has also entered a plea agreement and been sentenced to nine years (*Id.* at 528) also testified and denied that Stevens was involved (*Id.* at 529).

At the close of the State's case, counsel for Stevens made a Rule 29 Motion. The specific basis of the motion was that Stevens' participation amounted to less than $500.00, and thus he did not meet the requisites of R.C. §2923.31. He also argued that the testimony only established two separate sets of events that were not connected, and that Stevens' acts were a single act as they were so close in time. He also moved for the dismissal of the transactions involving Rickman and Finnegan as the dates were too vague from Rickman (T.t. at 475-478, 481-483). The State argued that the $500.00 threshold was for the enterprise, not the individuals (*Id.* at 479-481). The Court admitted that it was troubled by the $500.00 aspect (*Id.* at 488) and reserved decision on that aspect to do more research. The Rule 29 Motion was renewed (T.t. at 579-582). The State argued

legislative intent (*Id.* at 583-584). The court stated that the legislature was silent as to whether the individual had to receive $500.00 or the enterprise as a whole. The court went on to state that "it's a very difficult issue and it's apparently a case of first impression." The court found that no case law was on point. The court then overruled the Rule 29 Motion (*Id.* at 587).

The case was submitted to the jury, which proceeded to convict Stevens on all counts (T.t. at 673-677, see also Verdict Forms). The court proceeded to sentencing immediately. The court merged Count Eleven with Count Ten (*Id.* at 685). The court merged Counts Thirteen, Fourteen, Fifteen, and Sixteen into Count Twelve (*Id.* at 686). The court merged Counts Seventeen, Eighteen, Nineteen into Count Sixteen (*Id.*). Count Twenty One merged with Count Twenty (*Id.* at 687). Counts Twenty three, Twenty four, and Twenty five were merged with Count Twenty two (*Id.*) The court sentenced Stevens to nine years *(Id. at 696)* on Count One. The Court made that mandatory time (*Id.* at 697) pursuant to R.C. §2929.13(F), but did not specify which subparagraph of (F) was invoked (See Sentencing Entry). On Counts Ten, Twelve, Sixteen, Twenty, and Twenty two, the court sentenced to 11 months each (T.t. at 696-697, Sentencing Entry). The court ordered all the sentences to be run consecutively for a total of thirteen years and seven months (*Id.*) A notice of appeal was timely filed.

On appeal, the Fourth District agreed that the statute was ambiguous (App. Dec. at 7 and 17). The Fourth District opinion also agreed that when statutes are ambiguous they are to be construed in the defendant's favor, they held that to do so would defeat legislative intent (*Id.* at 8). This court accepted discretionary jurisdiction after a timely notice of appeal.

Argument in Support of Proposition of Law

Proposition of Law No. 1

R.C.§2923.31(I)(2)(c) requires a threshold amount of $500.00 value of contraband sold. Where the statute is ambiguous as to whether the aggregation of the combined value of contraband sold is an aggregation of the individual's illicit activities or an aggregation of the enterprise's illicit activities, the trial and appellate courts erred in adopting an interpretation against the accused and his liberty interest by aggregating the enterprise as a whole rather than the individual.

Introduction

The definition of corrupt activity as set forth in R.C.§ 2923.31 is a complex web of definitions. In this case, the central issue is the interpretation of the following portion of subsection (I)(2)(c):

> "When the total proceeds of the combination of violations, ... or value of the contraband or other property illegally possessed, sold, or purchased in the combination of violations exceeds five hundred dollars."

In this case, the State produced evidence of five purchases of contraband involving, either directly or indirectly, Stevens. On October 15, 2010, .1 grams was purchased by Finnegan from Rickman for $33 or 34.00 (T.t. at 178, 313, State's Exhibit 1). On October 17, 2010 Finnegan made a purchase from Stevens (*Id.* At 225-226, 315-317) at which she paid $65.00 for what she thought was .50 grams of heroin, but in fact was only .40 grams (*Id.* at 316, State Exhibit 3, T.t. at 179). Later that same day, she purchased from Rickman (T.t. at 228, 320), this time paying $40.00 for .095 grams of an heroin/cocaine mixture (T.t. at 321, 180 and State's Exhibit 5) . On October 19th, 2010 another arrangement was made to purchase from Rickman (T.t. at 230-231, 321). This time Finnegan purchased .117 grams of an heroin/cocaine mix (T.t. at 193, State

Exhibit 7) from Rickman for $40.00 (T.t. at 322-323). The final purchase using Finnegan took place on October 20th, 2010 from Stevens (*Id.* at 221-223, 323-325) This time she purchased .50 grams of an heroin/cocaine mix for $65.00 (T.t. at 325, 194, State's Exhibit 9). There were thus a total of 5 purchases on three days with a value of $243.00 or $244.00.

Ambiguity of the Statute

The defense made a Rule 29 Motion on Count One, arguing that the $243.00 did not meet the threshold definition of corrupt activity as the combined proceeds did not exceed $500.00 (T.t. at 475-478, 481-483) The State argued that the $500.00 threshold was for the enterprise, not the individuals (*Id.* at 479-481) The Court was troubled by the $500.00 aspect (*Id.* at 488) and reserved decision on that aspect to do more research. The Rule 29 Motion was renewed (T.t. at 579-582). The State argued legislative intent (*Id.* at 583-584). **The trial court and the appellate court stated that the legislature was silent as to whether the individual had to receive $500.00 or the enterprise as a whole**. The court proceeded to state that "it's a very difficult issue and it's apparently a case of first impression." The court found that no case law was on point. The court then overruled the Rule 29 Motion (*Id.* at 587).

The State is correct that the court's primary duty in interpreting statutes is to discern the legislative intent and give effect to the legislation. This is true even when the language being interpreted is ambiguous *Family Medicine Found., Inc. v. Bright* 96 Ohio St.3d 183 , 2002-Ohio - 4034 (2002). Statutory language is ambiguous if it is "susceptible to more than one reasonable interpretation." *State v. Jordan* 89 Ohio St.3d 488 (2000) , 2000-Ohio-225. In this case, it is clear that the language involved is ambiguous. As both the trial court and the appellate court

noted, the legislature is silent as to whether the $500.00 applied to the enterprise or to the individual (T.t. at 587, App. Dec. 7 and 17). Either interpretation is reasonable. Good arguments can be made for either interpretation. The prosecutor, trial counsel, and the court were all of the opinion that no case law was directly on point and indeed this is a case of first impression. There are numerous cases that aggregate smaller violations together for an individual to exceed the $500.00 threshold. See, for example *State v. Mendenhall* 2005-Ohio-3604 (2005 3rd Dist). But that is not the case here. In this case, what the State argued was that the combination of values applied across the enterprise, and thus scooped Stevens into the net even though his aggregate amount was less than $250.00. While that is a reasonable argument, so too is the argument that the statute intended that for a person to be engaging in corrupt activity, their own level of participation would need to exceed $500.00. This too, is a reasonable interpretation. This interpretation also allows the statute to have effect.

Interpretation of Ambiguous Criminal Statutes

For criminal statutes, Ohio has codified the rules of statutory interpretation in §2901.04(A) which states that "sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." The Supreme Court has also stated that ambiguous criminal statutes must be interpreted in favor of the defendant *U.S. v. Santos* 553 U.S. 507.

The trial court and the appellate court in this case did the exact opposite and interpreted liberally for the State and against the defendant. The trial court was faced with statutory language which could reasonably be interpreted in two different ways, and chose to interpret it liberally for

the state and strictly against the accused.

The appellate court's decision did not engage in detailed analysis of the individual versus group interpretation. The section of the opinion on the issue was pages 6-9, of which only one page (App. Dec. 9) dealt with actual analysis of the issue. The other pages simply laid out that in fact the statute was ambiguous and that it was appropriate for them to interpret it as such. In essence, the analysis was as follows: it does not make sense to say that if a group of individuals amassed a large value of transactions, but each individual kept their transactions below $500.00, then the individuals could avoid punishment. The "analysis" is that Ohio's RICO statute is meant to impose heightened accountability for organized criminal activity involving more than two people and that it must apply to the group conduct and therefore the prohibited amount focuses not on the individual (App. Decision at 9). The problem with this analysis is that it is entirely circular and conclusory. If one starts with the idea that the statute is designed to punish individuals, rather than groups, than the court's analysis is completely off, but an individual based view would be entirely consistent with the intent.

While it may be true that the statute is concerned with organized activity, the statute does not criminalize a group. Rather, it criminalizes the behaviors of individuals acting together in an **organized** manner. The Appellate Court observed that R.C. §2923.32 is based upon the Federal RICO statute and that the purpose of that statute was to "seek the eradication of organized crime" (App. Dec. At 8, quoting Organized Crimne Act of 1970, Statement of Findings and Purpose, 84 Stat. 922 reprinted in 1970 U.S. Code Cong & Adm. News at 1073).

This statute was written to deal with the Mafia. That was and is the basic driver of organized crime. What the appellate court missed was that the statute was concerned with

organized crime, but the crime was not dealt with in terms of the group, but rather individuals acting in concert. The essence of the criminal statute still centers on what an individual does. It therefore makes just as much sense to say that for an individual's criminal conduct to merit a separate punishment as part of a group, then that individual's own conduct must rise to a threshold amount. This makes sense because then one would truly be targeting individuals who are actively attempting to be part of a group activity. Otherwise, one ends up in the position of targeting ancillary actors who just happen to be connected to a larger enterprise of which they know nothing and of which they have no intention of participating. The entire point of the statute is to target **organized** crime. But under the State's theory, someone who is not acting in an organized way, and has no intention of doing so, but happens to engage in a criminal act with someone who is, is now dragged in and labeled as an organized criminal. This defeats the very express purpose. Yes, it is true that the State wants heightened accountability, but it is for *organized* criminal activity. The way to avoid punishing people who happen to be involved but are not in fact acting in an organized and group effort is to impose an individual threshold level. Thus, to punish an individual for an organized enterprise activity, the individual has to be committed enough to the group's action that their individual activity demonstrates such commitment by virtue of arising to the individual statutory level.

When faced with two reasonable options, the trial court was mandated by statute to choose the interpretation which favored the defendant. In this case, that meant that the trial court should have ruled that the aggregation of values applied only to Mr. Stevens individually. This in turn would have meant that the evidence presented only amounted to less than $250.00 and thus Mr. Stevens did not meet the threshold definition of corrupt activity. (Had the State wished to meet

the threshold amount, all they had to do was provide evidence of additional incidents for an additional $260.00 in sales, not a difficult thing to do if, as they alleged, Stevens was involved for more than six other months) The Rule 29 Motion should have been granted and a verdict of not guilty entered on Count One.

Proposition of Law No. 2

> The defendant was convicted of Engaging in a Pattern of Corrupt Activity under R.C. §2923.32(A)(1) and his predicate acts were all fifth degree felonies. The statute is ambiguous as to whether the predicate acts are the individual's acts or any other actor in the enterprise. The statute should be interpreted as to the individual, not the enterprise and thus where a jury makes no finding of a felony predicate act of the first, second, or third degree, the defendant should be sentenced as a second degree felony rather than a first degree felony under 2923.32(B).

Analysis

The jury found Stevens guilty under R.C. §2923.32 of Engaging in a Pattern of Corrupt Activity (T.t. at 673-677, see also Verdict Forms) This conviction was as a first degree felony, and he was sentenced to nine years (T.t. at 696, see also Sentencing Entry).

R.C. §2923.32(B) defines the sentencing parameters. It states that this violation is a second degree felony, unless one of the predicate acts was a third degree felony or higher. In this case, Stevens was convicted of sixteen counts involving either trafficking or possession of drugs (T.t. at 673-677, see also Verdict Forms). However, all of these counts were fifth degree felonies. Not one of them was a first, second, or third degree felony.

The State, and the Appellate Court, interpreted the statute to mean that any actor in the enterprise was sufficient to meet the predicate felony threshhold, even though the statute itself is

ambiguous on this point. Testimony was elicited from two of the individuals who had entered plea deals. Megan Butcher pleaded out to a F3 and an F2 (T.t. at 398), and Melinda Stewart pleaded out to 2 F3's (T.t. at 432) (The ringleader, Cassell, acknowledged that he had pleaded to Engaging in a Pattern of Corrupt Activity, but that was not an underlying offense (*Id.* at 532)).

The statute itself is vague, as the Appellate Court acknowledged (App. Dec. at 17), as to whether the "incidents of corrupt activity" applies to all of the incidents of the enterprise, or whether it applies only to the individual. Thus, the statute suffers from the same ambiguity discussed above as to the definition of corrupt activity and the aggregation of values. Thus, in this case, the interpretation in favor of Stevens would be a second degree felony, not a first degree.

Conclusion

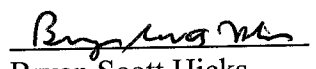
The trial court and the Appellate Court violated the Revised Code's requirement that when confronted with a criminal statute that is susceptible to two different reasonable interpretations the interpretation must be liberally construed in favor of the accused. In this case, when faced with the reasonable interpretations that the aggregation of values for meeting the $500.00 threshold of corrupt activity pertained to the aggregation of the individual's sales, or the aggregation of the enterprise's sales, the interpretation that favored the State was imposed, under the argument that it was necessary to implement the legislative intent, a circular argument. This same problem arises in sentencing Stevens as a first degree felony rather than a second degree felony as the statute is ambiguous as to whether the underlying predicate acts are those of the individual or those of the enterprise. Mr. Stevens should not have been convicted of Count One. Alternatively, the sentence was improper and the matter requires a remand for resentencing.

Respectfully Submitted,

Bryan Scott Hicks, Attorney for Mr. Stevens

Certificate of Service

I hereby certify that a copy of this brief was mailed on April 12, 2012, to the Highland County Prosecutor's Office at 112 Governor Foraker Place in Hillsboro, Ohio 45133 .



Bryan Scott Hicks
Attorney for Mr. Stevens

In the Supreme Court of Ohio

12-2003

State of Ohio Plaintiff-Appellee vs. Jeffrey Stevens Defendant-Appellant	:	Appeal of Fourth District Court of Appeals Decision of October 17, 2012 11 CA 27

Notice of Appeal

Bryan Scott Hicks, 0065022
Attorney for Jeffrey Stevens
P.O. Box 359
Lebanon, Ohio 45036
513-228-1111
hickslawoffice@gmail.com

State of Ohio
Anneka Collins, Highland County Prosecutor
OSC # 0079572
112 Governor Foraker Place
Hillsboro, Ohio 45133
937-393-1851

FILED
NOV 30 2012
CLERK OF COURT
SUPREME COURT OF OHIO

In the Supreme Court of Ohio

State of Ohio Plaintiff-Appellee vs. Jeffrey Stevens Defendant-Appellant	: : : : : : : :	Appeal of Fourth District Court of Appeals Decision of October 17, 2012 11 CA 27

Statement

Now comes Jeffrey Stevens, by and through appointed counsel, Bryan Scott Hicks, and provides Notice that he wishes the Ohio Supreme Court to accept his discretionary appeal of the Fourth District Court of Appeals decision of 10/17/12. This case involves a felony and is a case of public or great general interest. This notice is accompanied by a Memorandum in Support of Jurisdiction.

Respectfully Submitted,

Bryan Scott Hicks, 0065022
Attorney for Jeffrey Stevens
P.O. Box 359
Lebanon, Ohio 45036
513-228-1111
hickslawoffice@gmail.com

Proof of Service

On November 29, 2012, I, Bryan Scott Hicks mailed a copy by regular mail of this document and any attached pages to the Highland County Prosecutor's Office.

Bryan Scott Hicks
Attorney for Appellant

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO Plaintiff-Appellee, v. ZACHARY BONDURANT, and JEFFREY STEVENS, Defendants-Appellants.	Case No. 11CA25 11CA27 DECISION AND JUDGMENT ENTRY

FILED
COURT OF APPEALS
HIGHLAND COUNTY, OHIO
OCT 17 2012
HIGHLAND COUNTY CLERK OF COURTS

APPEARANCES:

Eric Allen, The Law Office of Eric J. Allen, LTD, Columbus, Ohio, for appellant Bondurant.

Bryan Scott Hicks, Lebanon, Ohio, for appellant Stevens.

Anneka P. Collins, Highland County Prosecutor, Hillsboro, Ohio, for appellee.

Harsha, J.

{¶1} In their joint trial, Zachary Bondurant and Jeffrey Stevens were each convicted of engaging in a pattern of corrupt activity, among other offenses. Initially they argue that there is insufficient evidence to support their convictions for engaging in a pattern of corrupt activity because the statute's monetary threshold applies to individual rather than collective enterprise profit. And they further argue that because the state failed to show that they individually profited by more than $500, their convictions cannot stand. However, the legislature intended for Ohio's RICO statute to reduce or eliminate organized criminal group activity by imposing a high level of accountability on those participating in it. Clearly, the focus of the statute is organized

group conduct. Accordingly, we conclude that the statute refers to collective profit, i.e. it only requires that the state prove the enterprise as a whole profited more than $500. And because the uncontested evidence makes it clear that the enterprise profited more than $500, there was sufficient evidence to support each of their convictions for engaging in a pattern of corrupt activity.

{¶2} Bondurant contends that his conviction for trafficking in drugs in a school zone is against the manifest weight of the evidence. He argues that the detective's testimony concerning the school and its proximity to the drugs sales was inadmissible hearsay and without this testimony, he could not be found guilty of the offense under R.C. 2925.03(A)(1). However, the court admitted a certified map of the area showing the distance. Therefore, even without the testimony Bondurant objects to, the trial's outcome would not have changed. He also argues that a letter admitted into evidence to show the building was a school was inadmissible hearsay because it does not fall within the business record exception. Nevertheless, the detective also testified that he had personal knowledge the location was a school. Accordingly, Bondurant's convictions are not against the manifest weight of evidence.

{¶3} Finally, Bondurant argues that his trial counsel provided ineffective assistance because he did not move to sever his case from his co-defendant Stevens and also failed to object to the detective's alleged inadmissible hearsay. Because Bondurant failed to provide an analysis of how his counsel's performance fell below a reasonable standard and how he was prejudiced by trying his case with his co-defendant, we deem this argument waived. And because we have already determined

that the detective's testimony did not prejudice him, we find Bondurant's hearsay related argument to be meritless.

{¶4} In his second assignment of error Stevens again challenges the language of Ohio's RICO statute. He argues that the trial court incorrectly sentenced him on a first-degree felony for engaging in a pattern of corrupt activity because R.C. 2923.32(B) elevates his conviction to a first-degree felony only if one of the incidents of corrupt activity was a third-degree felony or higher. He claims that because his other convictions in this case were only fifth-degree felonies, his conviction for engaging in a pattern of corrupt activity should have been a second-degree felony. As in his first assignment of error we must interpret the statute to determine the legislative intent. Considering that the legislature intended for Ohio's RICO statute to reduce or eliminate organized criminal group activity by imposing a high level of accountability, we conclude that the statute requires only that the enterprise as a whole engaged in an incident of corrupt activity that was a third-degree felony or higher. And because Stevens admits that two of the other actors in the enterprise were convicted of second and third-degree felonies, his first-degree felony conviction was justified. Alternatively, Stevens contends that the verdict form for his conviction was deficient because the jury did not make a finding that an individual in the enterprise committed a first, second or third-degree felony and consequently his conviction could not be elevated to a first-degree felony. However, the jury's verdict form identified the offense level, i.e. a first-degree felony, and therefore the jury did not also have to make a specific finding of an aggravating element to elevate his conviction.

{¶5} Finally, Stevens challenges his sentence for engaging in a pattern of corrupt activity and claims that the trial court incorrectly determined that a mandatory sentence applied to his conviction. He argues that R.C. 2929.13(F)(10) requires that the pattern of corrupt activity involve a first-degree felony and the state did not prove that anyone involved in the enterprise was convicted of the necessary offenses. However, the trial court could have imposed a mandatory sentence under R.C. 2929.13(F)(6) based on Stevens' previous first-degree felony conviction. Therefore, he has not proven that his sentence is clearly and convincingly contrary to law. And because trial courts have full discretion to impose a prison sentence within the statutory range, the trial court did not abuse its discretion by sentencing Stevens to nine years for a first-degree felony conviction.

I. OVERVIEW

{¶6} Over the course of several months, the Highland County Sheriff's Office and the U.S. 23 Pipeline Task Force investigated drug-related activity involving Zachary Bondurant, Jeffery Stevens and several others. Following this investigation, Bondurant was charged with one count of engaging in a pattern of corrupt activity, six counts of trafficking in drugs in a school zone and six counts of possession of drugs. Stevens was charged with one count of engaging in a pattern of corrupt activity, eight counts of trafficking in drugs and eight counts of possession of drugs. Both Bondurant and Stevens pleaded not guilty and their cases proceeded to a joint trial.

{¶7} At trial, the state alleged that Bondurant and Stevens were both involved in a "drug ring," headed by Rodger Cassell. The state theorized that Jeffery Stevens was his "right-hand man" and Bondurant was his "left-hand man." The state presented

evidence that showed a series of drug transactions involving Stevens and Bondurant to undercover informants. The jury convicted them of all counts and this consolidated appeal followed.

II. ASSIGNMENTS OF ERROR

{¶8} Bondurant presents three assignments of error:

{¶9} 1. "THE STATE FAILED TO OFFER SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF ENGAGING IN A PATTERN OF CORRUPT ACTIVITY THUS VIOLATING APPELLANT'S RIGHT TO DUE PROCESS PURSUANT TO THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT."

{¶10} 2. "THE JUDGMENT OF CONVICTION VIOLATING 2925.03 IS AGAINST THE WEIGHT OF THE EVIDENCE THAT THE ALLEGED DRUG ACTIVITY OCCURRED WITHIN THE VICINITY OF A SCHOOL."

{¶11} 3. "APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMDENDMENT TO THE FEDERAL CONSTITUTION, MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMDENDMENT, DUE OT THE APPELLANT'S TRIAL COUNSEL FAILING TO MOVE THE TRIAL COURT FOR AN ORDER SEVERING HIS TRIAL FROM CO-DEFENDANT'S TRIAL."

{¶12} Stevens also presents three assignments of error for our review:

{¶13} 1. "THE TRIAL COURT IMPROPERLY INTERPRETED R.C. § 2923.31 (I)(2)(c) WHEN IT AGGREGATED THE VALUES OF ALL DEFENDANTS IN MEETING THE $500.00 THRESHOLD."

{¶14} 2. "THE TRIAL COURT IMPROPERLY CONVICTED OF A FIRST-DEGREE FELONY."

{¶15} 3. "THE SENTENCE ON THE ENGAGING IN A PATTERN OF CORRUPT ACTIVITY WAS IMPROPERLY MANDATORY."

III. PATTERN OF CORRUPT ACTIVITY AND THE MONETARY THRESHOLD

{¶16} Because Bondurant and Stevens make the same argument we will address their first assignments of error together. Bondurant and Stevens both argue that there was insufficient evidence to convict them of engaging in a pattern of corrupt activity because the $500 threshold found in R.C. 2923.31(I)(2)(c) must be applied to each defendant individually. The state responds that the statute should be read to mean the $500 requirement applies to the enterprise as a whole. To determine which approach is correct, we must construe the statute.

A. Statutory Interpretation

{¶17} The interpretation of a statute is a question of law that we review de novo, without deference to the trial court's determination. *In re Adoption of B.M.W.*, 4th Dist. No. 10CA899, 2010-Ohio-5214, ¶ 13. "'The primary goal of statutory construction is to ascertain and give effect to the legislature's intent in enacting the statute. * * * The court must first look to the plain language of the statute itself to determine the legislative intent. * * * We apply a statute as it is written when its meaning is unambiguous and definite.'" *Id.*, quoting *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9. If the meaning of a statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary. *Mathews v. Waverly*, 4th Dist. No. 08CA787, 2010-Ohio-347, ¶ 23, citing *State ex rel. Savarese v. Buckeye Local School*

Dist. Bd. of Edn., 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996). We may interpret a statute only when it is unclear and ambiguous. *State v. Chappell,* 127 Ohio St.3d 376, 2010-Ohio-5991, 939 N.E.2d 1234, ¶ 16. A statute is ambiguous if its language is susceptible to more than one reasonable interpretation. *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 513, 668 N.E.2d 498 (1996).

{¶18} R.C. 2923.32(A)(1), which is Ohio's RICO statute, states: "No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt." At the time of trial, R.C. 2923.31(I)(2)(c) defined corrupt activity as follows:

> "Corrupt activity" means engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in * * * [c]onduct constituting any * * * violation of section * * * 2925.03 * * * of the Revised Code, * * * when the proceeds of the violation, the payments made in the violation, the amount of a claim for payment or for any other benefit that is false or deceptive and that is involved in the violation, or the value of the contraband or other property illegally possessed, sold, or purchased in the violation exceeds five hundred dollars, *or any combination of violations* described in division (I)(2)(c) of this section *when the total proceeds of the combination of violations*, payments made in the combination of violations, amount of the claims for payment or for other benefits that is false or deceptive and that is involved in the combination of violations, or value of the contraband or other property illegally possessed, sold, or purchased *in the combination of violations* exceeds five hundred dollars[.]" (Emphasis added.)

{¶19} The phrase "combination of violations" as used in R.C. 2923.31(I)(2)(c) is susceptible to more than one reasonable interpretation and therefore is ambiguous. Reading the statute it is unclear whether the legislature intended the phrase to mean combination of violations involving the enterprise, as the state contends, or an individual defendant's combination of violations, as Bondurant and Stevens claim. Accordingly,

we must interpret its language to determine the legislature's intent. We do this by considering, among other matters, the circumstances under which the statute was enacted, the legislative history and the consequences of a particular construction. *See* R.C. 1.49. Although Stevens points out that R.C. 2901.04(A) requires us to strictly construe criminal statutes against the state, statutes "should not be given an artificially narrow interpretation that would defeat the legislative intent." *State v. White*, Slip Opinion, 2012-Ohio-2583, ¶ 20.

{¶20} "In general, R.C. 2923.32 is based on the federal RICO statute * * *. Thus, a review of the purpose behind the federal statute is instructive." *State v. Schlosser*, 79 Ohio St.3d 329, 332, 681 N.E.2d 911 (1997). In enacting the federal RICO Act, Congress stated that "'the purpose of this Act [is] to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.'" *Id.*, quoting Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922, reprinted in 1970 U.S.Code Cong. & Adm. News at 1073.

{¶21} The Supreme Court of Ohio has noted that there is "little legislative history" about the enactment of Ohio's RICO statute, however comments by the Senate sponsor, "indicate an intent to impose the greatest level of accountability * * *." *Schlosser* at 333.

B. Analysis

{¶22} When Stevens and Bondurant initially raised this argument at trial in Crim.R. 29 motions the state clarified that it attributed $250 in the alleged drug sales to Stevens and $460 to Bondurant, but also maintained that it recovered over $35,000 from a search of Cassell's property. After researching the issue, the court concluded that the $500 threshold applied to the enterprise as a whole and overruled the motion. The court theorized that "if an enterprise accumulates a million dollars worth of transactions at four hundred dollars a pop under the theory * * * that the defendants are raising, then that person could never be guilty of corrupt activity as long as he had a number of people, none of whom had more than five hundred dollars in total sales. And that really doesn't make any sense."

{¶23} Although we review this claim without deference to the trial court's decision, we agree with its assessment. As the trial court stated, it would not make sense to let individuals escape punishment because they personally never dealt in a transaction over $500, although the enterprise they were involved in profited significantly. Considering that Ohio's RICO statute is meant to impose heightened accountability for organized criminal activity involving more than two people, *see* R.C. 2923.31(C), we interpret the statute to require only that the enterprise as a whole profited more than $500. Because the focus of the statute is upon prohibiting group conduct, it only makes sense that the prohibited amount would also focus on the group's "success," not that of each individual.

{¶24} And because Bondurant and Stevens do not dispute that the enterprise in this case profited more than $500, there was sufficient evidence to convict them each of engaging in a pattern of corrupt activity and we overrule their first assignments of error.

IV. MANIFEST WEIGHT OF THE EVIDENCE

{¶25} Addressing Bondurant's remaining assignments of error, he next argues that his convictions under R.C. 2925.03 for trafficking in drugs in a school zone are against the manifest weight of evidence. Specifically, he claims that Detective Denny Kirk's testimony regarding the proximity of the school to the drug sales was inadmissible hearsay. He also argues that a letter admitted into evidence by the state verifying the school was operational on the dates in question was not a business record subject to a hearsay exception. And without this evidence, he contends the state failed to prove its case.

A. Legal Standard

{¶26} When considering whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, and consider the creditability of witnesses to determine "'whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins,* 78 Ohio St.3d 380, 386, 678 N.E.2d 541(1997), quoting *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983).

{¶27} "If the prosecution presented substantial evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence." *State v. Puckett*, 4th Dist. No. 10CA3153, 2010-Ohio-6597, ¶ 33, citing *State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978), syllabus.

Thus, we will exercise our discretionary power to grant a new trial "'only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins*, 78 Ohio St.3d at 386, 678 N.E.2d 541(1997), quoting *Martin* at 175.

B. Statutory Requirements

{¶28} Bondurant was convicted of trafficking in drugs in a school zone under R.C. 2925.03(A)(1), which states "[n]o person shall knowingly * * * [s]ell or offer to sell a controlled substance." Section (C)(2)(b) of the statute further states "[i]f the drug involved in the violation is any compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of trafficking in drugs. The penalty for the offense shall be determined as follows * * * if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the third-degree * * *."

{¶29} "An offense is 'committed in the vicinity of a school' if the offender commits the offense on school premises, in a school building, or within one thousand feet of the boundaries of any school premises * * *." R.C. 2925.01(P). A "school premises" is a "parcel of real property on which any school is situated, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted on the premises at the time a criminal offense is committed." R.C. 2925.01(R). A "'[s]chool' means any school operated by a board of education, any community school established under Chapter 3314. of the Revised Code, or any nonpublic school for which the state board of education prescribes minimum standards under section 3301.07 of the Revised Code, whether or not any instruction, extracurricular activities, or training

provided by the school is being conducted at the time a criminal offense is committed." R.C. 2925.01(Q).

{¶30} The provisions of R.C. 2925.03 "clearly indicate that the Ohio legislature intended to punish more severely those who engage in the sale of illegal drugs in the vicinity of our schools and our children." *State v. Manley*, 71 Ohio St.3d 342, 346, 643 N.E.2d 1107 (1994). "[I]n order to convict a defendant under the school specification, the state must prove beyond a reasonable doubt that the drug transaction occurred within the specified distance of a school. The state has the burden of establishing all material elements of a crime by proof beyond a reasonable doubt. That requirement also applies in cases involving the imposition of an enhanced punishment upon proof of some additional element." (Citations omitted.) *Id.*

C. Plain Error

{¶31} Our review of the record shows that Bondurant did not object to Detective Kirk's testimony on the basis of hearsay. He also failed to object to the use of the letter during his testimony and its admission into evidence. Because Bondurant did not object to these alleged errors at trial, he has waived all but plain error on appeal. *See State v. Shahan*, 4th Dist. No. 02CA63, 2003-Ohio-6945, ¶ 9.

{¶32} "Pursuant to Crim.R. 52(B), plain errors or defects which affect substantial rights may be grounds for reversal even though they were not brought to the attention of the trial court." *State v. Phillips*, 74 Ohio St.3d 72, 83, 656 N.E.2d 643 (1995). We take notice of plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. "Plain error does not exist unless it

can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland*, 50 Ohio St.3d 58, 62, 552 N.E.2d 894 (1990). After reviewing the record, we cannot say that the outcome of trial would have clearly been different without Detective Kirk's testimony concerning the proximity of the school to the drug sales and admission of the letter.

{¶33} Bondurant claims that Detective Kirk's testimony that "the GIS office told him [the school] was 477 feet" from the drug sales was inadmissible hearsay. He also asserts that a letter sent from Highland County Community Action Organization was inadmissible hearsay not subject to the business record exception because there was no foundation laid by the detective to admit the letter.

{¶34} However, without objection from either defendant, the state offered into evidence a certified map from the Highland County GIS. This map shows the location of both the Head Start pre-school and Bondurant's apartment where the drug sales took place. The map includes a computer generated line labeling the distance between the two locations as 477 feet. In addition, the map also includes a scale. A certified copy of a plat map is a public record that is admissible as a hearsay exception under Evid.R. 803(8). *State v. Sloan*, 8th Dist. No. 79832, 2002-Ohio-2669, ¶ 32. Furthermore, under Evid.R. 902 a certified copy of the map is self-authenticating. *Id.* Therefore, even without Detective Kirk's testimony, there was substantial evidence presented by the state to show that the drug sales involving Bondurant occurred within 1000 feet from the Head Start pre-school.

{¶35} Finally, Detective Kirk testified without objection that he was familiar with the Head Start school referred to in the letter and had personal knowledge that the

school was operational. He testified that "[o]ver the years of investigating cases I've been at the facility and observed it to be a Head Start; and then when I contacted Community Action, they verified that it does continue to be a facility." He also testified that the Head Start school was operational from January to March 2011 and "[a]ccording to the Community Action, it was a pre-school at that time." Thus, without considering the letter from the Highland County Community Action Organization, Detective Kirk's testimony alone was sufficient to establish that the Head Start facility was a school under R.C. 2925.01(Q). *See State v. Manley*, 71 Ohio St.3d 342, 348, 643 N.E.2d 1107 (1994). Especially considering that this testimony went unchallenged by either defendant at trial. *Id.*

{¶36} Thus, even if we reject the evidence Bondurant objects to, we cannot say the result of his trial clearly would have been different. Because the trial court did not commit plain error, we overrule his second assignment of error.

V. INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶37} Finally, in his third assignment of error Bondurant claims that his trial counsel was ineffective because he failed to file a motion to sever his trial from his co-defendant, Stevens.

A. Legal Standard

{¶38} To establish ineffective assistance of counsel, a defendant must show (1) deficient performance by counsel, that is, performance falling below an objective standard of reasonable representation; and (2) prejudice, meaning that there is a reasonable probability that but for counsel's errors, the proceeding's result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052,

80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. We also "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

B. Motion to Sever

{¶39} App.R. 16(A)(7) requires the appellant to "include in its brief, under the headings and in the order indicated, all of the following * * * [a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary."

{¶40} Although, Bondurant provided much law in his brief regarding ineffective assistance of counsel and joinder, he failed to argue how his counsel's performance was deficient or how he was prejudiced by his performance. Rather, the only argument that Bondurant offers is that he "not only has to fight the charges against him, but he must also fight the charges against Jeffery Stevens and Rodger Cassell as well."

{¶41} "It would be inappropriate for us to create an argument on the [appellant's] behalf." *In re A.Z.*, 4th Dist. No. 11CA3, 2011-Ohio- 6739, ¶ 19. "'If an argument exists that can support [an] assignment of error, it is not this court's duty to root it out. * * * It is not the function of this court to construct a foundation for [an appellant's] claims [.]'" *Id.*

at ¶ 18, quoting *Coleman v. Davis*, 4th Dist. No. 10CA5, 2011–Ohio–506, ¶ 13. "In other words, '[i]t is not * * * our duty to create an argument where none is made.'" *In re A.Z.* at ¶ 18, quoting *Deutsche Bank Natl. Trust Co. v. Taylor,* 9th Dist. No. 25281, 2011-Ohio-435, ¶ 7. Therefore, we conclude Bondurant has not overcome the strong presumption that counsel's performance was reasonably professional.

C. Failure to Object

{¶42} Bondurant also argues that his trial counsel provided ineffective assistance because he failed to object to Detective Kirk's testimony that allegedly contained inadmissible hearsay. And he also claims that his trial counsel was ineffective for not objecting to the admission of the letter from the Highland County Community Action Organization. However, we have already determined that even without Detective Kirk's testimony about the GIS and the letter, there was still sufficient evidence to convict him of trafficking in drugs in a school zone. Therefore, even if we assume arguendo that his trial counsel's performance was deficient by failing to object, Bondurant cannot prove he was prejudiced. Accordingly, we overrule his third assignment of error.

VI. ENGAGING IN A PATTERN OF CORRUPT ACTIVTY AND OFFENSE LEVEL

{¶43} Turning to Stevens' remaining claims, in his second assignment of error he again challenges the language of Ohio's RICO statute. He argues that the trial court incorrectly sentenced him on a first-degree felony for engaging in a pattern of corrupt activity. Stevens points out that under R.C. 2923.32(B) engaging in a corrupt activity is only elevated to a first-degree felony if one of the "incidents of corrupt activity" was a third-degree felony or higher. Because his other convictions in this case were only fifth-

degree felonies, he claims his conviction for engaging in a pattern of corrupt activity should have been a second-degree felony. The state contends that the phrase "incidents of corrupt activity" refers to the enterprise as a whole, rather than the individual defendant; and because at least one of Stevens' co-defendants was convicted of a third-degree felony, his first-degree felony conviction was proper. Thus, as in his first assignment of error, we must first examine the statute to determine which approach is correct.

A. Law and Analysis

{¶44} Stevens was convicted of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1). R.C. 2923.32(B)(1) states, "[w]hoever violates this section is guilty of engaging in a pattern of corrupt activity. Except as otherwise provided in this division, engaging in corrupt activity is a felony of the second degree. Except as otherwise provided in this division, if at least one of the incidents of corrupt activity is a felony of the first, second, or third degree, aggravated murder, or murder * * * engaging in a pattern of corrupt activity is a felony of the first degree."

{¶45} We find that the phrase "incidents of corrupt activity" as used in R.C. 2923.32(B)(1) is susceptible to more than one reasonable interpretation and therefore is ambiguous. It is unclear from the statute's plain language if the legislature intended the phrase to refer to an individual defendant's incidents of corrupt activity, as Stevens claims, or the enterprise's corrupt activity, as the state argues. Therefore, we must interpret the statute to determine the legislature's intent.

{¶46} As we stated in Section III(A), the legislature intended for Ohio's RICO statute to impose the greatest level of accountability for organized criminal activity.

Thus, consistent with our earlier analysis, we conclude that the phrase "incidents of corrupt activity" as used in Ohio's RICO statute refers to the enterprise as a whole. Therefore, a defendant may be convicted of a first-degree felony if one of the enterprise's incidents of corrupt activity constituted a felony of the first, second, or third-degree. *But see State v. Chamblin*, 4th Dist. No.02CA753, 2004-Ohio-2252, ¶ 26.

{¶47} In *Chamblin* we previously stated that to sustain a conviction under R.C. 2923.32 for a first-degree felony *the appellant* must have been convicted of a first, second or third degree felony that was part of the pattern of corrupt activity. *Id.* Because we determined that Chamblin's conviction for the predicate third-degree felony offense could not stand, we also concluded that he could not be convicted of a first-degree felony under R.C. 2923.32(B). *Id.* However, *Chamblin* did not involve the issue presented here, i.e. whether the enhancement is available based upon any member of the enterprise having the requisite conviction.

{¶48} Here, Stevens does not dispute that the other members of the enterprise were convicted of the necessary felonies. He concedes that two actors in the enterprise testified at trial that they were convicted of second and third-degree felonies. Thus, under our interpretation of R.C. 2923.32(B)(1) he was properly convicted of a first-degree felony for engaging in a pattern of corrupt activity.[1]

B. Verdict Forms

{¶49} Alternatively, Stevens also claims that the jury's verdict form for his conviction was deficient under the standard set forth in *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735. He urges us to remand his case for resentencing

[1] Stevens' argument only focuses on statutory construction and not a constitutional violation.

because the jury failed to make a specific finding that one of the "incidents of corrupt activity" was a first, second or third-degree felony.

{¶50} However, our review of the record shows that Stevens did not object to the verdict forms at trial. Nevertheless, "the Supreme Court of Ohio has recognized error, even in the absence of an objection at trial, when a verdict form fails to comply with R.C. 2945.75(A)(2)." *Portsmouth v. Wrage,* 4th Dist. No. 08CA3237, 2009-Ohio-3390, ¶ 42, citing *Pelfrey*.

{¶51} R.C. 2945.75(A)(2) provides: "When the presence of one or more additional elements makes an offense one of more serious degree: * * * A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged." And "[p]ursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." *Pelfrey* at syllabus.

{¶52} "R.C. 2945.75(A)(2) and *Pelfrey* apply only to criminal offenses with multiple degrees of seriousness. For example, in *Pelfrey,* the defendant was found guilty of tampering with records in violation of R.C. 2913.42. Depending on the seriousness of the conduct, tampering with records under R.C. 2913.42 may be a misdemeanor of the first degree, a felony of the fifth degree, a felony of the fourth degree, or a felony of the third degree. See RC. 2913.42(B)(1)-(4). The verdict form in *Pelfrey* did not list the aggravating element (tampering with government records) or the

degree of the offense (a third degree felony pursuant to R.C. 2913.42(B)(4)). *Pelfrey* at ¶ 13." *State v. Norman*, 4th Dist. Nos. 08CA3059 & 08CA3066, 2009-Ohio-5458, ¶ 61.

{¶53} Here, a conviction under R.C. 2923.32 for engaging in a pattern of corrupt activity has multiple degrees of seriousness. Depending on the seriousness of the incidents of corrupt activity, it can be either a first or second-degree felony. R.C. 2923.32(B). Thus, the jury's verdict form must comply with R.C. 2945.75(A)(2) and *Pelfrey*.

{¶54} Although Stevens claims that the court itself enhanced his conviction to a first-degree felony, this is not the case. The jury's verdict form clearly stated the degree of the offense. The form states, "[w]e, the jury, having been duly impaneled and sworn, find the defendant, Jeffery Stevens guilty of Engaging in a Pattern of Corrupt Activity, *a first degree felony* as he stands charged in Count 1 of the indictment." (Emphasis added.) Because the form clearly stated that the jury found Stevens guilty of a first-degree felony, it did not also have to state the jury made a specific finding that one of the incidents of corrupt activity was a first, second or third-degree felony. To comply with R.C. 2945.75(A)(2) and *Pelfrey,* the verdict form need only state either the degree of the offense or that the jury found an aggravating element present. The verdict form satisfied this requirement. Therefore, we overrule Stevens' second assignment of error.

VII. SENTENCING

{¶55} Finally in his third assignment of error Stevens challenges his sentence for engaging in a pattern of corrupt activity. Stevens claims that the trial court incorrectly determined that a mandatory sentence applied to his conviction. Specifically, he argues before imposing a mandatory sentence, the statute requires that the pattern of corrupt

activity involve a first-degree felony; here the state did not prove that anyone involved in the enterprise was convicted of a first-degree felony. Therefore, he claims the trial court improperly sentenced him to a mandatory term under R.C. 2929.13(F)(10).

A. Standard of Review

{¶56} "[A]ppellate courts must apply a two-step approach when reviewing felony sentences. First, [we] must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 26.

B. Law and Analysis

{¶57} The jury found Stevens guilty of engaging in a pattern of corrupt activity, a first-degree felony, and the trial court sentenced him to nine years imprisonment. At sentencing the court stated, "the Defendants have been convicted of engaging in a pattern of corrupt activity, a first-degree felony. I believe that there's a mandatory sentence. * * * And three to ten is the range of sentence that there is." The court also stated: "So as to Defendant Stevens, the potential sentence on [Engaging in a Pattern of Corrupt Activity] is actual three, mandatory actual three to ten years." The state and Stevens' trial attorney both agreed with the court's statements. Although the court never orally explained the basis for its conclusion that the sentence was mandatory, nevertheless, the judgment entry of conviction indicates that the court found "that a mandatory prison term is required by 2929.13(F) ORC."

{¶58} R.C. 2929.13(F) requires the sentencing court to impose a mandatory prison term for certain serious offenses and limits the court's discretion to reduce that term, except in certain enumerated circumstances. *State v. Johnson*, 116 Ohio St.3d 541, 2008-Ohio-69, 880 N.E.2d 896, ¶¶16, 17. The statute states: "Notwithstanding divisions (A) to (E) of this section, the court shall impose a prison term or terms under sections 2929.02 to 2929.06, section 2929.14, section 2929.142, or section 2971.03 of the Revised Code and * * *shall not reduce the term * * * for any of the following offenses * * * (10) Corrupt activity in violation of section 2923.32 of the Revised Code when the most serious offense in the pattern of corrupt activity that is the basis of the offense is a felony of the first degree."

{¶59} Although Stevens argues that this is the only subsection that applies to his case, our review indicates otherwise. R.C. 2929.13(F)(6) also requires a mandatory sentence for: "Any offense that is a first or second degree felony and that is not set forth in division (F)(1), (2), (3), or (4) of this section, if the offender previously was convicted of or pleaded guilty to * * * any first or second degree felony * * *[.]" At trial, Stevens testified that he was previously convicted of complicity to aggravated robbery. And because complicity to aggravated robbery is a felony of the first-degree, *see* R.C. 2911.01(C) and R.C. 2923.03(F), the trial court could have based its finding that Stevens' conviction required a mandatory sentence under R.C. 2929.13(F)(6). In fact, before announcing Stevens' sentence the court noted that Stevens testified that he had been convicted of complicity to aggravated robbery, in addition to several other offenses. In light of the fact that we review judgments, not the rationale behind them, we cannot say the courts sentence was clearly and convincing contrary to law.

{¶60} Finally, trial courts have full discretion to impose a prison sentence within the statutory range. At the time of his sentencing R.C. 29291.4(A)(1) provided that a first-degree felony was punishable by a term of three to ten years. Accordingly, the trial court did not abuse its discretion by sentencing Stevens to nine years for a first-degree felony conviction. We overrule Stevens' third assignment of error.

VI. CONCLUSION

{¶61} In conclusion, we overrule each of Bondurant's assignments of error and affirm the judgment of the trial court in his case. We also overrule each of Stevens' assignments of error and affirm the judgment of the trial court in his case.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellants shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

Atty Allen

CERTIFICATE TO COPY

ORIGINAL ON FILE

THE STATE OF OHIO, HIGHLAND COUNTY:

FOURTH DISTRICT COURT OF APPEALS

I, the undersigned, clerk of the 4th District Court of Appeals, within and for said County and in whose custody the Files, Journals and Records of said Court are required by the Laws of the State of Ohio to be kept, do hereby certify that the foregoing is taken and copied from the original, now on file in said Court, that said foregoing has been compared by me with the original document and that it is a true and correct copy thereof.

IN TESTIMONY WHEREOF, I hereunto subscribe my name officially and affix the seal of said Court, at the Court House, in Hillsboro, Ohio in and for said County, this 17TH day of OCTOBER, 2012

DWIGHT O. HODSON, CLERK

By: Deputy Carolyn Lander

APX-2

2901.04 Rules of construction for statutes and rules of procedure.

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

Effective Date: 03-23-2000; 09-23-2004

APX-28

(I) "Corrupt activity" means engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in any of the following:

(1) Conduct defined as "racketeering activity" under the "Organized Crime Control Act of 1970," 84 Stat. 941, 18 U.S.C. 1961(1)(B), (1)(C), (1)(D), and (1)(E), as amended;

(2) Conduct constituting any of the following:

(a) A violation of section 1315.55, 1322.02, 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2905.01, 2905.02, 2905.11, 2905.22, 2905.32 as specified in division (I)(2)(g) of this section, 2907.321, 2907.322, 2907.323, 2909.02, 2909.03, 2909.22, 2909.23, 2909.24, 2909.26, 2909.27, 2909.28, 2909.29, 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2911.31, 2913.05, 2913.06, 2921.02, 2921.03, 2921.04, 2921.11, 2921.12, 2921.32, 2921.41, 2921.42, 2921.43, 2923.12, or 2923.17; division (F)(1)(a), (b), or (c) of section 1315.53; division (A)(1) or (2) of section 1707.042; division (B), (C)(4), (D), (E), or (F) of section 1707.44; division (A)(1) or (2) of section 2923.20; division (E) or (G) of section 3772.99; division (J)(1) of section 4712.02; section 4719.02, 4719.05, or 4719.06; division (C), (D), or (E) of section 4719.07; section 4719.08; or division (A) of section 4719.09 of the Revised Code.

(b) Any violation of section 3769.11, 3769.15, 3769.16, or 3769.19 of the Revised Code as it existed prior to July 1, 1996, any violation of section 2915.02 of the Revised Code that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would have been a violation of section 3769.11 of the Revised Code as it existed prior to that date, or any violation of section 2915.05 of the Revised Code that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would have been a violation of section 3769.15, 3769.16, or 3769.19 of the Revised Code as it existed prior to that date.

(c) Any violation of section 2907.21, 2907.22, 2907.31, 2913.02, 2913.11, 2913.21, 2913.31, 2913.32, 2913.34, 2913.42, 2913.47, 2913.51, 2915.03, 2925.03, 2925.04, 2925.05, or 2925.37 of the Revised Code, any violation of section 2925.11 of the Revised Code that is a felony of the first, second, third, or fourth degree and that occurs on or after July 1, 1996, any violation of section 2915.02 of the Revised Code that occurred prior to July 1, 1996, any violation of section 2915.02 of the Revised Code that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would not have been a violation of section 3769.11 of the Revised Code as it existed prior to that date, any violation of section 2915.06 of the Revised Code as it existed prior to July 1, 1996, or any violation of division (B) of section 2915.05 of the Revised Code as it exists on and after July 1, 1996, when the proceeds of the violation, the payments made in the violation, the amount of a claim for payment or for any other benefit that is false or deceptive and that is involved in the violation, or the value of the contraband or other property illegally possessed, sold, or purchased in the violation exceeds one thousand dollars, or any combination of violations described in division (I)(2)(c) of this section when the total proceeds of the combination of violations, payments made in the combination of violations, amount of the claims for payment or for other benefits that is false or deceptive and that is involved in the combination of violations, or value of the contraband or other property illegally possessed, sold, or purchased in the combination of violations exceeds one thousand dollars;

2923.32 Engaging in pattern of corrupt activity.

(A)

(1) No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt.

(2) No person, through a pattern of corrupt activity or the collection of an unlawful debt, shall acquire or maintain, directly or indirectly, any interest in, or control of, any enterprise or real property.

(3) No person, who knowingly has received any proceeds derived, directly or indirectly, from a pattern of corrupt activity or the collection of any unlawful debt, shall use or invest, directly or indirectly, any part of those proceeds, or any proceeds derived from the use or investment of any of those proceeds, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

A purchase of securities on the open market with intent to make an investment, without intent to control or participate in the control of the issuer, and without intent to assist another to do so is not a violation of this division, if the securities of the issuer held after the purchase by the purchaser, the members of the purchaser's immediate family, and the purchaser's or the immediate family members' accomplices in any pattern of corrupt activity or the collection of an unlawful debt do not aggregate one per cent of the outstanding securities of any one class of the issuer and do not confer, in law or in fact, the power to elect one or more directors of the issuer.

(B)

(1) Whoever violates this section is guilty of engaging in a pattern of corrupt activity. Except as otherwise provided in this division, engaging in corrupt activity is a felony of the second degree. Except as otherwise provided in this division, if at least one of the incidents of corrupt activity is a felony of the first, second, or third degree, aggravated murder, or murder, if at least one of the incidents was a felony under the law of this state that was committed prior to July 1, 1996, and that would constitute a felony of the first, second, or third degree, aggravated murder, or murder if committed on or after July 1, 1996, or if at least one of the incidents of corrupt activity is a felony under the law of the United States or of another state that, if committed in this state on or after July 1, 1996, would constitute a felony of the first, second, or third degree, aggravated murder, or murder under the law of this state, engaging in a pattern of corrupt activity is a felony of the first degree. If the offender also is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, engaging in a pattern of corrupt activity is a felony of the first degree, and the court shall sentence the offender to a mandatory prison term as provided in division (B)(7) of section 2929.14 of the Revised Code and shall order the offender to make restitution as provided in division (B)(8) of section 2929.18 of the Revised Code. Notwithstanding any other provision of law, a person may be convicted of violating the provisions of this section as well as of a conspiracy to violate one or more of those provisions under section 2923.01 of the Revised Code.

(2) Notwithstanding the financial sanctions authorized by section 2929.18 of the Revised Code, the court may do all of the following with respect to any person who derives pecuniary value or causes

APX-30